UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of J.L. MARSHALL & SONS, INC. Employer and BOSTON PLASTERERS AND CEMENT MASONS LOCAL 534, a/w OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION Petitioner and INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS, LOCAL NO. 1, CT, AFL-CIO, CLC Intervenor and INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS, LOCAL NO. 3, AFL-CIO, CLC Intervenor	Case 1-RC-21682

DECISION AND DIRECTION OF ELECTION[1]

[1] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

The Employer, J.L. Marshall & Sons, Inc., a general contractor based in Seekonk, Massachusetts, performs construction work at job sites in Massachusetts, Rhode Island, and Connecticut. The Petitioner, Plasterers Local 534, seeks to represent a unit consisting of all full-time and regular part-time cement masons and apprentice cement masons employed by J.L. Marshall at all of its jobsites, regardless of their location. J.L. Marshall takes the position that the unit sought by Plasterers Local 534 is appropriate. Intervenor Bricklayers Local No. 1, however, contends that it has a Section 9(a) agreement with J.L. Marshall that acts a bar to the petition with respect to any work performed by J.L. Marshall in Connecticut. It also asserts that the appropriate unit should be geographically limited to exclude J.L. Marshall employees who perform work at jobsites in Connecticut. I find that Bricklayers Local No. 1 has a Section 9(a) relationship with J.L. Marshall that precludes Plasterers Local 534 from seeking an election that covers work performed by the Employer in Connecticut and shall, therefore, limit the unit scope accordingly.

Background

For many years, the International Union of Operative Plasterers (Plasterers) and the International Union of Bricklayers and Allied Craftsmen (Bricklayers) followed an agreement concerning the geographical jurisdiction of local unions throughout the country.[2] Under this agreement, Plasterers Local 534 had jurisdiction over cement masons performing work in 44 cities and towns in the Boston metropolitan area that were listed in its collective-bargaining agreements, and Bricklayers Local No's. 1 and 3 had jurisdiction over the other cities and towns in Massachusetts.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. In this regard, I shall deny Intervenor Local 1-C's motion to defer the petition to a pending proceeding under Article X of the AFL-CIO Constitution. Assuming that the dispute between the Petitioner and the Intervenor could be resolved by Article X, the 30-day deferral period provided for in the Board's Casehandling Manual covers only proceedings under Article XX of the AFL-CIO Constitution and does not contemplate Article X proceedings. Alley Drywall, Inc., 333 NLRB 1005 (2001). Further, while correspondence submitted by the Intervenor indicates that the National Arbitration Panel has now accepted the dispute for resolution under Article X, no hearing date has been set beyond an agreement that the hearing will occur no sooner than the week of January 26, 2004. Thus, it appears likely that the Article X proceeding will not be completed for several months. I find that deferral is inappropriate in these circumstances; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[2] Pursuant to the parties' agreement at the hearing, I take official notice of the testimony of Charles Raso and Carmen Barasso at the hearing in Reliable Concrete, Case 1-RC-21343, in which this history was set forth.

In 1998, the Plasterers unilaterally revoked its agreement with the Bricklayers concerning geographical limitations. In July 2000, the Plasterers' decision was upheld at the convention of the Building & Construction Trades Department of the AFL-CIO. Thereafter, the Plasterers authorized Plasterers Local 534 to expand its jurisdiction to include the entire Commonwealth of Massachusetts, New Hampshire, Vermont, and Maine.

Contract bar

Bricklayers Local No. 1 asserts that it has a Section 9(a) relationship with J.L. Marshall in Connecticut that acts as a bar to the petition insofar as it covers work performed in that state. Plasterers Local 534 asserts that Bricklayers Local No. 1 has failed to demonstrate the existence of a Section 9(a) relationship. I find that a Section 9(a) relationship has been established.

J.L Marshall is signatory to collective-bargaining agreements with Plasterers Local 534 in Massachusetts, Plasterers Local 40 in Rhode Island,[3] Bricklayers Local No. 1 in Connecticut, and Bricklayers Local No. 3 in Massachusetts.[4] J.L. Marshall has been signatory to contracts with Bricklayers Local No. 1 for a number of years. The current multiemployer agreement between AGC/CCIA Building Contractors Labor Division of Connecticut, Inc., of which J.L. Marshall is a member, and Bricklayers Local No. 1 is effective from April 1, 2002 through March 31, 2006.

Article I of the AGC/CCIA contract with Bricklayers Local No. 1 states:

> The Employer acknowledges that the Union has demonstrated that it represents a majority of its employees in the bargaining unit described herein by providing or offering to provide executed union authorization cards. Therefore, the Employer recognizes the Union as the exclusive bargaining representative of its employees in accordance with Section 9(a) of the National Labor Relations Act.

Article II provides that "This agreement shall apply to all work performed in covered employment within the State of Connecticut. Article X describes the Union's jurisdictional claims to include cement masonry.

Joseph Farina, J.L Marshall's general superintendent, is responsible for overseeing all of J.L. Marshall's jobs. He testified that, at least in the two years he has been general superintendent, J.L. Marshall has not employed employees who belong to the Bricklayers Union to do cement finishing work or for any purpose.[5] Farina testified

[3] Plasterers Local 40 has not intervened in this matter.

[4] In its post-hearing brief, J.L. Marshall characterizes its collective-bargaining agreements with Plasterers Local 534 and both Bricklayers Locals as "9(a)" agreements.

[5] J.L. Marshall subcontracts bricklaying work.

that J.L. Marshall currently has only one job in Connecticut, at Foxwoods Casino, where the Employer has subcontracted to do concrete work for an addition and a parking garage. No cement masons have worked at that job yet. As for previous work in Connecticut, Farina testified that J.L. Marshall had a job in the late 1990's at the Mystic Aquarium that required cement masons. The foreman told him that, for the most part, J.L. Marshall used its own employees from Local 40 of the Plasterers Union for that job, but also supplemented its workforce with a few men from the Bricklayers Local in Connecticut. Farina testified that he does not know if the Foxwoods Casino and Mystic jobs were the only two jobs in Connecticut in the eight years he has been with the company. He thinks there was another job at Torre Plastics in Connecticut in the early 1990's.

In the construction industry, parties may create a bargaining relationship pursuant to either Sections 9(a) or 8(f) of the Act. In the absence of evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a). The burden of proving the existence of a Section 9(a) relationship rests with the party asserting its existence. Reichenbach Ceiling & Partition Co.;[6] H.Y. Floors & Gameline Painting.[7]

The Board has held that a written agreement will establish a Section 9(a) relationship if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown or having offered to show, an evidentiary basis of its majority support. In this regard, written contract language, standing alone, may independently establish Section 9(a) bargaining status. Additionally, a union's required request for recognition can be fairly implied from contract language stating that the employer grants the required recognition. Central Illinois Construction.[8] Finally, a challenge to majority status must be made within a 6-month period after the grant of Section 9(a) recognition. Reichenbach Ceiling & Partition Co.;[9] Verkler, Inc.;[10] Casale Industries.[11]

I find that the contractual language quoted above is sufficient to demonstrate the existence of a Section 9(a) relationship between Bricklayers Local No. 1 and J.L. Marshall with respect to work performed by J.L. Marshall within the State of

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[6] 337 NLRB No. 17 (2001).

[7] 331 NLRB 304 (2000).

[8] 335 NLRB 717 (2001).

[9] Supra.

[10] 337 NLRB No. 18 (2001).

[11] 311 NLRB 951 (1993).

Connecticut. Bricklayers Local No. 1's request for recognition may be implied from the Employer's recognition of the Union, and the agreement states that J.L. Marshall's recognition was based on the Union's having provided or offered to provide executed union authorization cards. While it is unclear from the record exactly when J.L. Marshall and Bricklayer's Local No. 1 first entered into a Section 9(a) relationship, it was, in any event, no later than March 31, 2002, when the 2002-2006 agreement was executed. Accordingly, Plasterer Local 534's petition by which it asserts, in effect, that the recognition is not majority-based, is untimely, because it was filed more than six months after the recognition. Saylor's, Inc.;[12] Reichenbach Ceiling & Partition Co.;[13] Verkler, Inc.[14]

Plasterer's Local 534 argues that, in Nova Plumbing, Inc.,[15] the Court found that contract language standing alone cannot establish a Section 9(a) bargaining relationship where there is a strong indication that the parties have only a Section 8(f) relationship, and that a union claiming 9(a) status in such cases must produce evidence of actual majority support. Here, there is no record evidence of actual majority support, and Plasterer's Local 534 asserts that Bricklayers Local No. 1 could not possibly have had actual majority support because the record in this matter shows that J.L. Marshall did not employ any members of the Bricklayers at the time the parties' collective-bargaining agreement was signed. Finally, Plasterer's Local 534 notes that the Court in Nova Plumbing found that the six-month time limit for ULP charges did not apply in the absence of evidence of a 9(a) relationship.

In reaching my decision, however, I am constrained to follow Board law as set forth in Central Illinois Construction rather than the law of a circuit court of appeals.[16]

Appropriate unit

J.L. Marshall performs construction work either as a general contractor or subcontractor and may have anywhere from eight to twelve jobs going on at any given time. For jobs that require cement-finishing work, J.L. Marshall may use its own cement masons or subcontract the work to another firm, depending on the cost and size of the

[12] 338 NLRB No. 35 (2002).

[13] Supra.

[14] Supra.

[15] 330 F.3d 531 (D.C. Cir. 2003).

[16] In any event, while it is true that the record reflects that J.L. Marshall has employed no members of the Bricklayers in the last two years, the record does not reveal when the 9(a) language at issue first appeared in the parties' collective-bargaining agreement. Thus, it is possible that J.L. Marshall first granted 9(a) recognition to Bricklayers Local No. 1 years ago, at a time when J.L. Marshall did employ members of the Bricklayers to do cement masonry work in Connecticut.

project. Cement masons form, place, and finish the concrete aspects of a project. They do structural foundation work, such as setting up the form for big footings and walls, placing slabs on metal decks, and finishing them.

As noted above, Joseph Farina is the Employer's general superintendent. He oversees all of the Employer's jobs, moving manpower and equipment between them. He is assisted by Bob Niles, vice president of operations. Each particular job has a project superintendent.

J.L. Marshall performs work in Massachusetts, Rhode Island, and Connecticut. Its recent jobs in Rhode Island included a waste water treatment plant in Providence and a bus facility in East Providence. Its projects in Massachusetts have included three in Boston, as well as the Medical Center project in Worcester.[17] As noted above, J.L. Marshall currently has a job to perform concrete work at Foxwoods Casino in Connecticut.

Farina testified that J.L. Marshall employs a nucleus of eight to thirteen cement masons on a regular, full-time basis.[18] They work throughout the year. Farina moves them from job to job and does not lay them off when a job is over. They have worked at jobs in all three of the states where the Employer performs work.

When Farina needs additional manpower for a particular day, he obtains cement masons through the Plasterers Local 40 hiring hall for work in Rhode Island or through the Plasterers Local 534 hiring hall for work in Massachusetts. He lays them off at the end of the day. Records from Local 40 and Local 534 indicate that, over the past two years, in addition to the core group of employees, J.L. Marshall has employed 47 cement masons on a daily basis.

It is well settled Board law that a union need not seek to represent the most appropriate unit or most comprehensive unit, but only an appropriate unit. Transerv Systems;[19] Morand Bros. Beverages Co.[20] In deciding whether a unit is appropriate, the Board weighs various factors, including differences or similarities in the method of

[17] J.L. Marshall used a subcontractor to perform the cement finishing work at the Medical Center project.

[18] Farina testified that he defines a core employee as an employee who has worked at least 300 to 400 hours per year for J.L. Marshall. All of them are members of Plasterers Local 534 or Plasterers Local 40. Records from the two locals indicate that employees who have worked in excess of 300 hours a year in one or both of the last two years include Anthony Canzone, Joseph DeAngelis, Steven DeConti, James Dennehy, Joseph Giandomenico, Robert Giannino, Kenneth Iannuccilli, Tom Imondi, Ernest Isom, Robert Kingston, Richard Michaud, William Redmond, and Francis Woods.

[19] 311 NLRB 766 (1993).

[20] 91 NLRB 409 (1950).

wages or compensation, hours of work, employment benefits, supervision, working conditions, job duties, qualifications, training, and skills. The Board also considers the degree of integration between the functions of employees, contact with other employees, and interchange with other employees, as well as history of bargaining. Overnite Transportation Co.[21] The petitioner's desire as to the unit is a relevant consideration, though not dispositive. Florida Casino Cruises.[22]

Plasterer's Local 534 seeks to represent J.L. Marshall's cement masons wherever they are employed, with no territorial limitations. With the exception, for the reasons explained above, that it is appropriate to exclude employees who perform work in Connecticut, I find that a unit of all of the Employer's cement masons, without regard to job location, is appropriate. J.L. Marshall employs a core group of employees who move from job to job in various locations. They share common duties, skills, and supervision. They share common pay and working conditions, since the Plasterers' collective-bargaining agreements have governed their employment.

Bricklayers Local No. 1 contends that the petitioned-for unit must exclude employees performing work in Connecticut on the additional ground that the unit sought is broader in scope than the unit historically covered by the collective-bargaining agreements between the Plasterers and J.L. Marshall. I need not reach this issue because I have already determined to exclude employees working in Connecticut on the basis of contract bar. I note, however, that while bargaining history is a factor to be weighed in determining appropriate units, it is not conclusive, and that the Board has found it to be outweighed by other community of interest factors in a similar case involving these parties. Alley Drywall, Inc.[23]

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cement masons and apprentice cement masons employed by the Employer at its various job site locations, but excluding cement masons who perform work at the Employer's job site locations in Connecticut, all other employees, office clerical employees, guards, and supervisors as defined in the Act.

[21] 322 NLRB 723, 724 (1996), citing Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

[22] 322 NLRB 857, 858 (1997), citing Airco, Inc., 273 NLRB 348 (1984).

[23] 333 NLRB 1005 (2001).

DIRECTION OF ELECTION[24]

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by (1) Boston Plasterers and Cement Masons Local 534, a/w Operative Plasterers and Cement Masons International Association, or (2) International Union of Bricklayers & Allied Craftworkers Local No. 1, CT, AFL-CIO CLC or (3) International Union of Bricklayers & Allied Craftworkers Local No. 3, AFL-CIO, CLC.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should

[24] Because J.L. Marshall is engaged in the construction industry, the eligibility of voters will be determined by the formula set forth in Daniel Construction Co., 133 NLRB 264 (1961), and Steiny & Co., 308 NLRB 1323 (1992).

have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc.;[25] NLRB v. Wyman-Gordon Co.[26] Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.[27] In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before November 14, 2003. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must by received by the Board in Washington by November 21, 2003.

/s/ Ronald S. Cohen
Ronald S. Cohen, Acting Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 7th day of November, 2003.

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[25] 156 NLRB 1236 (1966).

[26] 394 U.S. 759 (1969).

[27] 315 NLRB 359 (1994).